

1 IN THE UNITED STATES DISTRICT COURT
2 FOR THE NORTHERN DISTRICT OF ILLINOIS
3 EASTERN DIVISION

4 UNITED STATES OF AMERICA,)
5 Plaintiff,)
6 -vs-) Case No. 12 CR 416
7 CHARLES B. ESTELL,) Chicago, Illinois
8 Defendant.) August 5, 2013
9 10:30 a.m.

10 TRANSCRIPT OF PROCEEDINGS
11 BEFORE THE HONORABLE GARY FEINERMAN

12 APPEARANCES:

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1 (Proceedings heard in open court:)

2 THE CLERK: 12 CR 416, USA versus Estell.

3 MR. KING: Good morning, your Honor. Patrick King
4 and Carol Bell on behalf of the United States.

5 THE DEFENDANT: Good morning, sir.

6 THE COURT: Good morning.

7 MR. MITCHELL: Good morning, your Honor. Gregory
8 Mitchell on behalf of Mr. Charles Estell, Judge, who's present
9 in court.

10 THE COURT: Okay. Good morning. Are we ready to
11 proceed with the pretrial conference?

12 MR. MITCHELL: Yes, Judge. I think the government,
13 though, would like -- they superseded on Mr. Estell.

14 THE COURT: Right.

15 MR. MITCHELL: So, I think the first thing I guess we
16 have to do is have him arraigned.

17 THE COURT: Right. And tell me, what's the marginal
18 difference between the indictment and the superseding
19 indictment?

20 MR. KING: Count 2 specifies the word "brandished."
21 A change in the law this June, the Supreme Court alleges any
22 element which would increase a statutory minimum penalty ought
23 to be alleged or at least decided by the jury. And in an
24 abundance of caution, we thought if the jury had to decide it,
25 the superseding indictment ought to say it. So, instead of,

1 "used and carried the firearm in a crime of violence," it now
2 says, "used, carried, and/or brandished."

3 THE COURT: Understood.

4 MR. MITCHELL: Understood, Judge. The bottom line is
5 that the government could have just offered an instruction,
6 and if the jury specifically with brandishing, then that
7 Guideline would have applied. But it's fine, Judge.

8 THE COURT: I think they're just trying to be safe.

9 MR. MITCHELL: Yes, Judge. I understand.

10 THE COURT: Okay. So, are you ready to proceed with
11 the arraignment on the superseding indictment?

12 MR. MITCHELL: Yes, Judge.

13 THE COURT: Okay. Mr. Mitchell, have you received a
14 copy of the superseding indictment?

15 MR. MITCHELL: I have, Judge.

16 THE COURT: And you've reviewed it with Mr. Estell?

17 MR. MITCHELL: Yes, Judge.

18 THE COURT: Would you like it read in court?

19 MR. MITCHELL: No, Judge. I think with this
20 explanation with respect to Count 2 -- Count 1 is the exact
21 same. With respect to Count 2, Judge, they just alleged
22 brandishing, as opposed to having --

23 THE COURT: So, you waive reading?

24 MR. MITCHELL: That's correct, Judge.

25 THE COURT: And let me ask the government to advise

1 the defendant of the maximum penalties in this case.

2 MR. KING: The maximum penalty for Count 1 is
3 25 years' imprisonment. For Count 2, it's a mandatory minimum
4 seven years consecutive to a maximum of life. The statutory
5 fines are the same, \$250,000 or twice the gross gain or loss
6 to the institution for 1, and \$250,000 on 2. So, it's
7 approximately \$750,000 or \$500,000, depending on how you --

8 THE COURT: All right. And would the defendant like
9 to enter a plea to the superseding indictment?

10 MR. MITCHELL: He enters a plea of not guilty to
11 Counts 1 and 2, Judge.

12 THE COURT: All right. And I'm assuming there are no
13 Rule 16 materials that need to be turned over that haven't
14 already been turned over, is that correct?

15 MR. KING: No, your Honor. We're continuing to --
16 yes. We're all caught up, and we're continuing to even
17 deliver more.

18 THE COURT: I see. Is that your understanding,
19 Mr. Mitchell?

20 MR. MITCHELL: Yes, Judge. I've got a substantial
21 amount. I was just advised this morning that there's some
22 additional material probably duplicative of what I've already
23 got; but just to be on the safe side, Judge, I'm going to get
24 it and review it.

25 THE COURT: All right. So with that out of the

1 way -- and you're welcome to stand if you'd like; but we're
2 going to be here a little while, so if you'd like to sit down,
3 if some of you would like to sit down or all of you would like
4 to sit down, you can, or you can remain standing, whatever
5 you're more comfortable doing.

6 So, the government provided --

7 MR. MITCHELL: He's got papers in there.

8 THE COURT: Okay. We'll hold on for one moment.

9 Okay. The government has a proposed statement of the
10 case, which is docket No. 56. Mr. Mitchell, do you oppose
11 that?

12 MR. MITCHELL: No objection, Judge, to that.

13 THE COURT: Okay. So, the statement of the case will
14 be as proposed by the government.

15 The government submitted a witness list, which is
16 docket No. 54. Are you definitely planning on calling all of
17 these witnesses, or are some of these folks may-calls?

18 MR. KING: Judge, we're still trying to work out
19 with -- if we can shorten this and whether there would be any
20 stipulations. We may need some additional record-keepers. We
21 may have to bring somebody from the FDIC. That's the best we
22 can give you right now. We're going to make an effort to
23 shorten this if we can.

24 THE COURT: And just for my benefit, can you just
25 briefly describe each of these folks?

1 MR. KING: Yes, your Honor. The first individual, I
2 believe, is the girlfriend/fiance of the defendant. The
3 second is a female acquaintance of the defendant. The third
4 individual is a bank representative who would authenticate the
5 security video and account for the money from the bank.

6 The third individual is an FBI agent. The fourth
7 individual is a teller at the bank. The next individual is an
8 FBI agent.

9 THE COURT: That's Landau?

10 MR. KING: Yes, your Honor. Martinez is a teller at
11 the bank. Wentz is an FBI agent. Raschke we expect we'll
12 call. He's an FBI agent. And I'm going to address that at
13 the end of our motion today.

14 Hunt is an officer from the Oak Lawn Police
15 Department, as is Hudziak. The next four individuals are FBI
16 agents.

17 And then we mentioned that there's various
18 record-keepers who the agencies haven't identified yet as
19 to who they're going to send as their record-keeper.

20 THE COURT: I see.

21 MR. KING: And the parole officer, we haven't had
22 that person designated yet.

23 THE COURT: All right. As soon as you have those
24 names, let me know, because I'll want to read all the names of
25 the potential witnesses to the potential jurors.

1 MR. KING: Yes, your Honor.

2 THE COURT: And if -- I'm not going to ask you who
3 your witnesses are going to be because you may not know at
4 this point; but to the extent that you know that you're going
5 to have a witness before trial, if you could let me know just
6 because I don't want some witness to show up and then have
7 people on the jury know that individual and that would cause a
8 problem.

9 MR. MITCHELL: Understood, your Honor.

10 THE COURT: Any discussion about these witnesses that
11 we need to have?

12 MR. KING: Not at this point, your Honor. I think
13 we're still in the process of discussing them.

14 THE COURT: All right.

15 MR. MITCHELL: And I think, Judge, the key is that
16 Mr. King just indicated there's some additional *Jencks*
17 material that I might be getting, so obviously, with respect
18 to prior statements that witnesses may have provided those
19 statements, I have to review those as well.

20 THE COURT: All right. Is this going to -- are there
21 going to be any documentary exhibits?

22 MR. MITCHELL: I know we will have some, Judge.

23 MR. KING: We haven't finalized our exhibits, but I'm
24 confident there's going to be an FDIC certificate. There's
25 going to be money, photographs. When you say documentary, I'm

1 not sure, your Honor. Like say, for instance, there will
2 probably be a diagram of the bank.

3 THE COURT: Okay.

4 MR. KING: We're going to ask you at the end of
5 business today -- it's not really a secret that at one point,
6 we had the motion to have the defendant's cellphones examined
7 with testing. Those results haven't been done; but at the end
8 of this week, we expect to come and ask you for an order
9 authorizing cell site location so we can see if we can
10 determine where the phones were located. That may well
11 involve a chart or a map to show where the various locations
12 are.

13 So, for your purposes today, the government would
14 expect to use photographs. We're not bringing the money in.
15 The weapon, the certificate from the FDIC, assume a map, and
16 assume a diagram of the bank.

17 THE COURT: And those will be demonstrative exhibits,
18 the maps and the diagrams?

19 MR. KING: We would expect in advance of trial, as we
20 get closer to it and we hone the issues -- and we're not quite
21 clear on where the defense issues are going to be, which will
22 affect the witnesses and the physical exhibits. But as we get
23 closer -- well -- I mean, before we go to trial, you'll get a
24 copy of an exhibit list with copies of the exhibits that are
25 copyable, as will the defendant, so that when we're at trial,

1 we won't have to go and exchange exhibits. It will be marked
2 for everybody to have.

3 THE COURT: Okay. That's really what I was -- going
4 to be my next question, which is you two will -- both sides
5 will talk about your various exhibits; and if there are going
6 to be evidentiary issues, you'll let me know?

7 MR. MITCHELL: Yes, Judge.

8 MR. KING: Yes.

9 THE COURT: All right. And if you do -- I'm hoping
10 that you'll provide the Court with an exhibit book.

11 MR. KING: Yes, your Honor, with the list, I'll get
12 you a copy of the exhibits.

13 MR. MITCHELL: Yes.

14 THE COURT: Very good. And if it's not -- if it's
15 too much of a burden, then don't worry about it; but if it's
16 not too much of a burden, if you could provide two sets of
17 your exhibit book, just so my clerk can have one as well.

18 MR. MITCHELL: Can we have an overhead here as well,
19 so we don't have to have the 12 for the jurors, we should just
20 use an overhead?

21 THE COURT: Yes. And you know you should talk with
22 Joe Novak about that.

23 MR. KING: Yours is where?

24 THE COURT: My -- I don't have a --

25 MR. KING: Screens.

1 THE COURT: Yeah, I have screens. So, there's
2 usually a screen right here, which is big, and then we can
3 have two -- one or two television screens on either side of
4 the jury box. Sometimes there's just one in the back; and
5 sometimes there's one in the front as well, although we have
6 to position it so that the jurors can see the witness.

7 You may not go through Joe Novak. You may have your
8 own equipment, is that right?

9 MR. KING: I think they all have to talk to each
10 other.

11 THE COURT: Right. Okay. So, you all know who to
12 talk to?

13 MR. MITCHELL: You're going to get it? We're going
14 to have it here, or no?

15 MR. KING: I'll talk to them, yes.

16 MR. MITCHELL: All right.

17 THE COURT: Okay. In terms of voir dire questions,
18 the government provided some suggestions. Is the defendant
19 going to make any suggestions?

20 MR. MITCHELL: I need to talk with Mr. Estell about
21 that, Judge. I think we may have one or two, and it's really
22 going to be tied to where the instructions are.

23 THE COURT: I see. And let me ask that we have a
24 date certain by which you'll provide those to the Court.
25 When's our trial date?

1 MR. KING: September 9th, I believe. Let me just
2 double-check.

3 MR. MITCHELL: Next Monday, Judge. That should be
4 fine.

5 THE COURT: Oh, that's -- I don't need it by next
6 Monday. So, if you need more time, that's fine. So,
7 September 9th is the trial date? Why don't we say by
8 August 30th.

9 MR. MITCHELL: That works.

10 THE COURT: If you want to get it in early, that's
11 fine, too.

12 And then jury instruction, I have jury instructions
13 from the government.

14 MR. MITCHELL: If I can approach, Judge. I've
15 tendered -- we essentially have one, Judge, and it's a
16 modified instruction for Seventh Circuit Pattern Jury
17 Instruction 6.08, and I've given it to the government already,
18 Judge, discussed it with Mr. Estell.

19 And given the nature of this case, Judge, and the
20 theory of defense, we would ask that that modified instruction
21 be given.

22 THE COURT: All right. Does this correspond -- or is
23 this intended to replace an instruction that the government
24 proposed?

25 MR. MITCHELL: Yes, Judge, and that would be

1 instruction No. 20.

2 THE COURT: And do you have any objection to the
3 government's other instructions?

4 MR. MITCHELL: The only other one that I have an
5 objection to, Judge, is 32. Everything else is pretty
6 standard, Judge. The only -- my objection to 32, Judge, is
7 that the focus on the firearm, there seems to be like three or
8 four different instructions now on the firearm.

9 I mean, we superseded. 27 deals with the brandish
10 term. 26(a) is the gun. 28 is again the use of -- deployment
11 of a firearm. A person carries a firearm. Firearm, No. 30.
12 It's like six different instructions on the firearm. To me,
13 it just seems overkill and a focus, Judge. And I don't think
14 Jury Instruction 32 adds anything about expelling a projectile
15 or anything else. There's no evidence of any shots being
16 fired. There's none of that. So, I just think, Judge, that
17 this is overkill.

18 MR. KING: Your Honor, if I might briefly respond --

19 THE COURT: Sure.

20 MR. KING: It's an element of the offense. We've
21 offered to stipulate that it's a firearm so that the jury is
22 instructed that it's a firearm; but if you look at Government
23 Exhibit 26(a), the jury is instructed that they must find that
24 the defendant knowingly used or carried a firearm during and
25 in relation to the crime. So, unless they know -- and that's

1 why it's a pattern instruction.

2 So, we're offering -- if he feels that there's some
3 undue prejudice about expelling a projectile, we'll offer to
4 stipulate that that element is satisfied, that the Glock 26
5 was a firearm.

6 MR. MITCHELL: We can stipulate to that, Judge.

7 THE COURT: All right.

8 MR. KING: Then we'll prepare a stipulation, and when
9 the final jury instructions come, we can agree to withdraw
10 that, your Honor.

11 THE COURT: Okay. So, the parties will work on a
12 stipulation; and if there's a stipulation, we can strike
13 Government's Proposed Instruction 32.

14 MR. MITCHELL: Yes.

15 THE COURT: As to the Government Proposed Instruction
16 No. 20 and Defendant's Proposed Instruction No. 1, I obviously
17 haven't had a chance to take a look at the defendant's
18 proposed instruction, but what does the government think about
19 it, if you've had a chance to consider it?

20 MR. KING: Just looking at it briefly, your Honor,
21 we're objecting to it. It contains a number of surplusage,
22 repeating other information that's contained in another
23 instruction, such as a defense of coercion, which is actually
24 an inaccurate statement of the law.

25 And although a minor modification, there's a -- when

1 he drops down to paragraph -- subparagraph 1, "seriously kill
2 or injure his son or fiance," we can live with that, and that
3 he didn't commit the offense, which is closer to what the
4 pattern instruction says. It need not be repeated in
5 section 2. I don't know whether the son is an infant, isn't
6 an infant, but it's really irrelevant. The question is the
7 identity of another person.

8 Our instruction was, as his original statement was to
9 us, injure him or his girlfriend. So, substituting son for
10 himself, that isn't really troubling.

11 But the other stuff is more troubling. It's
12 irrelevant. It's surplusage, and in some regards inaccurate.

13 THE COURT: What other stuff are you talking about?

14 MR. KING: If you look in paragraph No. 1, after the
15 word "coerced," "bank robbery, he did so because he was
16 coerced." So, the section beginning, "Like self-defense or
17 duress, coercion is an affirmative defense designed to spare a
18 person from punishment," that sentence, that's surplusage. It
19 ends at, "robbery." That was inserted into the pattern.

20 THE COURT: I see.

21 MR. KING: The other change to the pattern, as I
22 suggest, is infant and, "the bank robbery, as directed," is
23 not in keeping with the pattern and shouldn't be there.

24 The question that I'm also alerting you to is that --
25 our instruction differs is that the offense of coercion is

1 directed to Counts 1 and 2. His only is directed to Count 1.

2 THE COURT: Do you intend it to be directed towards
3 Counts 1 and 2?

4 MR. MITCHELL: No, just Count 1, Judge. Again, my
5 concern is this, Judge. And first, if I can respond to the
6 first part, those cases that I cite, Judge, that language,
7 "like self-defense or duress," is a quotation coming out of
8 the cases that I cite here. So, with respect to that, that's
9 right out of the cases.

10 THE COURT: Right. But just because something -- an
11 Appellate Court says something in a case doesn't make it
12 automatically appropriate for a jury instruction, and the
13 Court of Appeals itself has said that.

14 MR. MITCHELL: I understand that, Judge. But given
15 the theory of defense here, the concern is that the
16 government -- that the jury understands with respect to what
17 the standard is. And this adds the question that if he acted
18 under threats or conditions that a person of ordinary firmness
19 would have been able to resist, or if he reasonably believed
20 that the criminal action was necessary to avoid harm more
21 serious than that sought to be prevented in the bank robbery.

22 In this particular case, that's what the facts point
23 out, that -- the life of his infant son and his fiancée, as
24 opposed to a bank robbery. And that's exactly the comparison
25 that the coercion defense addresses.

1 And so the pattern instruction doesn't -- doesn't
2 explain it in that regard. It doesn't talk about the level of
3 how serious he has to understand and what the threat has to be
4 in comparison to what he's doing, because different crimes
5 that are being committed requires a different amount of
6 firmness or commitment over it. So, this explains it better.

7 And again, Judge, given the nature of the
8 overwhelming evidence that the government has in this case, I
9 mean, completely -- there is no question that's being alleged
10 with respect to Mr. Estell and this bank robbery. The only
11 question that's before the jury is to why. And the coercion
12 defense is: Why we do this? And this explains it.

13 And I think the cases support that view, and I think
14 the cases are on point that the defendant, if there's a
15 reasonable basis to raise it, has a right to have the jury
16 hear his theory of defense.

17 THE COURT: All right. I don't have to make a
18 decision now. I'll take a look at the -- a closer look at
19 the instruction that the defendant just handed me, and I'll
20 take a look at the pattern, and I'll make a decision
21 probably --

22 MR. KING: May we also still have an opportunity to
23 look at the cases that are cited here?

24 THE COURT: Sure. You can file whatever you'd like.
25 Same with the defendant. You can file whatever you'd like.

1 MR. MITCHELL: And in respect to the second question,
2 your Honor, with respect to the other change that was made is
3 that the government put in is that he reasonably feared a
4 person that he did not know, and that's not quite accurate,
5 either, Judge, because it's argument about what he knew. He
6 knew that the people who threatened him are the same people
7 who kidnapped him, and that's the identity of the people. So,
8 we substituted that as well. I don't think the government is
9 arguing in that regard, but that's a change.

10 And then the last issue with respect to, "as
11 directed," Judge, again, that's the -- that's the theory.
12 That's the theory of the case here. It's one thing to just
13 simply be in fear, but in this case, it's, "directed to commit
14 the bank robbery." And so that's more accurate and describes
15 what the jury has to decide in this case, as opposed to the
16 open-ended instruction from the -- it's not surplusage. It's
17 essential, we think.

18 THE COURT: All right. I'll take a look at that.
19 Any other jury instruction issues?

20 MR. MITCHELL: No, Judge. I went through everything,
21 and it appears that those are the only ones that are relevant.

22 MR. KING: I don't see any at the moment, Judge. I
23 mean, obviously, as we get into trial --

24 THE COURT: Yes.

25 MR. KING: -- these may alter somewhat, to the extent

1 that there's facts. I think this covers it right now.

2 THE COURT: Great. In terms of our panel we'll
3 have -- obviously, we'll have 12 jurors and two alternates.
4 The government will get six peremptories. The defendant will
5 get 10. And then I think each side gets one extra peremptory
6 per alternate, is that correct?

7 MR. KING: That's fine, Judge.

8 MR. MITCHELL: That's fine, Judge.

9 THE COURT: So, I'm trying to figure out how many
10 jurors, potential jurors I ought to order.

11 MR. MITCHELL: Just so I understand your practice is
12 you put them in the box, and then you strike, and then the
13 ones that are left are a part of it? There's no back strikes,
14 correct?

15 THE COURT: I do -- we do all the strikes at once.
16 So, I'm going to question 1 through 35, 1 through 40, and
17 then -- so, everybody's going to fill out a questionnaire that
18 I'm going to -- that they'll get either the Friday before or
19 the Monday morning of, depending upon what part of the
20 two-week period the trial starts. I should actually tell you
21 that right now.

22 Yeah, it's going to have to be Monday morning. So,
23 they'll fill out the questionnaires. Jackie will make copies
24 for both sides as soon as they're available. And I'll ask --
25 we're going to get everybody in the courtroom, all the

1 potential jurors in the courtroom at once. Some will be in
2 the box. Some will be on the benches. And we're just going
3 to go straight through, and I'm going to ask everybody
4 questions. Even if I have nothing to ask them about, I'll
5 just try and engage them in conversation about something just
6 so you can get some sense of the potential juror.

7 And then I'll excuse everybody. And then you'll tell
8 me whether you want me to ask follow-up questions of any of
9 the potential jurors. And then that will happen. Then I'll
10 excuse everybody again, and it may be that we only need to
11 bring in one or two of the potential jurors for follow-up
12 questions.

13 And then we'll do -- we'll discuss whether anybody
14 ought to be excused on hardship grounds. And then we'll do
15 motions to strike for cause. And then we'll do peremptories.
16 And then the first 12 on the list will be our jurors, and then
17 the next two will be our alternates.

18 I don't know if that answers your question about back
19 strikes.

20 MR. KING: So, it will be in the order in which you
21 call them?

22 THE COURT: Yes.

23 MR. KING: Okay. And we'll have that order ahead of
24 time?

25 THE COURT: Yes. And so if you want to -- I guess by

1 back strike -- I'm not sure I know what you mean by back
2 strikes, but you could strike -- use your peremptory on
3 No. 35, and then you could use your peremptory on No. 17 after
4 that.

5 MR. KING: I think what he's referring to is when
6 they seated juries in groups of four --

7 THE COURT: Right, no. We're not going to do that.

8 MR. KING: But that's not the procedure here.

9 MR. MITCHELL: You're going to do all 48 at one time?

10 THE COURT: Hopefully all 40, but that's my next
11 question, which is: Given the procedure, how many potential
12 jurors do you suggest that we order? My presumption is 40,
13 but let me know if you think we ought to go higher or lower.

14 MR. KING: I don't see any reason to go higher,
15 Judge. Basically, you're talking about 16 peremptory strikes,
16 then you have hardship. Of course, you can't really tell
17 during the summer what anyone's going to do. I think 40's a
18 safe number.

19 THE COURT: Mr. Mitchell?

20 MR. MITCHELL: My concern is that there are multiple
21 law enforcement agencies that are involved, that we may need
22 some extra because there may be jurors who may know -- because
23 we've got Oak Lawn, we've got FBI.

24 THE COURT: The FBI and Oak Lawn. If it were City of
25 Chicago, there may be an issue, probably not.

1 MR. MITCHELL: We can start with 40, Judge. I just
2 don't know.

3 MR. KING: I can't -- I don't recall the last time
4 I've actually tried a bank robbery to give you an answer, but
5 I think it's a good starting number.

6 THE COURT: Okay. Why don't we go with 40. We'll
7 get to the motions *in limine* in a minute.

8 But we'll start -- let me take a look at my calendar
9 here. We'll start Monday morning, let's plan on -- you all
10 should plan on being here by about 9:15, and we'll hopefully
11 get started by about 9:45. Hopefully that's when we'll have
12 the copies of the written questionnaires. But we may have
13 some stuff to discuss beforehand, so if you could be here by
14 9:15 on Monday morning. Then during the week, you're
15 planning -- how many days do you think the trial will last?

16 MR. KING: I think three. Once again, Judge, I guess
17 it depends on how the defense unfolds. That's from our
18 perspective evolving somewhat and whether we want to preempt
19 that.

20 THE COURT: No more than a week?

21 MR. KING: In any event, I don't see this going
22 beyond a week, no matter what happens.

23 THE COURT: That's fine. And each day, we'll start
24 around 9:30 or 9:45, depending on how my morning call looks.

25 We'll have one break in the morning, one break in the

1 afternoon, and then of course, a lunch break during the middle
2 of the day.

3 I like to keep going until somewhere between 4:30 and
4 5:00 o'clock, unless we have a juror from Ottawa or something
5 who needs to catch a particular train.

6 And you'll -- each side will let the other side know
7 what witnesses that side intends to call the following day.
8 Is that acceptable?

9 MR. KING: That's fine.

10 MR. MITCHELL: That's fine, Judge.

11 THE COURT: All right. Anything else about the trial
12 procedure?

13 MR. KING: If I might, how long do you anticipate
14 jury selection usually takes and whether we should have a
15 witness waiting, or how long -- I don't want an unusual gap,
16 but sometimes jury selection takes where at most we do an
17 opening statement plus the jury selection and then the next
18 day start promptly with the proofs and roll through, or do you
19 have a sense of how you'd like to do this --

20 THE COURT: I would have your first witness ready to
21 go in kind of mid to late afternoon. I tend to be -- or at
22 least I think that I'm pretty efficient in terms of picking a
23 jury, so hopefully we'll be done if not by lunch, then shortly
24 after lunch, maybe 2:00 o'clock, and then you can do your
25 openings. And it really -- as to whether we get into the

1 testimony that first day, it will really depend on whether --
2 how efficient we are on jury selection, how long the opening
3 statements take, and who your first witness is. If it's
4 somebody who's a quick witness, that will be one thing. If
5 it's somebody who's going to carry over, we might want to hold
6 off until Tuesday. It really depends.

7 MR. KING: With respect to the elevators, would the
8 witnesses use the one side and then the jurors use the other
9 side to keep them --

10 THE COURT: Yeah. I'd like to have the jurors use
11 the south elevator, and everybody else should use the north
12 elevator.

13 MR. KING: I'm trying to think. There's something
14 else. Generally just for scheduling purposes for ours, your
15 lunch break tends to be a certain duration at a certain time,
16 or is it --

17 THE CLERK: Between noon -- let me say between 11:45
18 and 12:30 we'd start, and then I usually give an hour on the
19 short side, an hour 15 on the long side.

20 MR. MITCHELL: And just a standard motion, Judge, to
21 exclude the witnesses from the courtroom.

22 MR. KING: That would be fine, Judge. We have no
23 objection, other than the fact that the case agent may
24 ultimately testify, and we'd expect that he'd be able to --

25 THE COURT: How many case agents do you plan on

1 having?

2 MR. KING: Just one.

3 MR. MITCHELL: Yeah, the one case agent, I guess,
4 would be at the table. Obviously, Judge, that's fine.

5 THE COURT: Okay.

6 MR. KING: I can't think of anything else as to
7 procedure.

8 THE COURT: All right. So, let's go to the motions
9 *in limine*.

10 Mr. Mitchell, I know you filed your oppositions this
11 morning, and I've had a chance to take a look, a brief look at
12 your brief.

13 Now, with respect to motion *in limine* No. 1, can you
14 tell me what the issue is? I'm not sure I understand what
15 practical dispute the parties have over these statements.

16 MR. KING: I think in part, I'm alerting the Court to
17 the fact that the defendant made three separate statements.

18 THE COURT: Right.

19 MR. KING: The first statement just stands alone.
20 The second two statements were given under proffer protection.

21 THE COURT: Right.

22 MR. KING: So, the government has agreed --

23 THE COURT: According to you. The defendant says
24 that the third statement was not given under proffer
25 protection.

1 MR. KING: Well, that's in factual dispute, and maybe
2 that's something that needs to be addressed. But if you
3 assume from our standpoint for a moment that the second two
4 statements are -- we're contractually precluded from offering
5 evidence or alluding to them during our case in chief; and if
6 the defendant chooses to testify and if he presents a position
7 inconsistent with it, then we may seek to offer one or both of
8 them.

9 And we're suggesting to the Court that the two
10 statements that from our view are proffer-protected are
11 inconsistent as they exist. So, no matter which one he
12 chooses, he's triggering these protected statements into
13 evidence.

14 So, if we can't bring them before the jury, but the
15 defendant were to somehow suggest that our failure to do so
16 somehow was concealing evidence or working to his
17 disadvantage, that would put us in an unfavorable position.
18 That would be unfair and inaccurate.

19 So, we want to preclude evidence or arguments
20 regarding those or the inadmissibility -- and if, say, for
21 instance, they are triggered during the course of the trial,
22 then I think the government would be entitled to a limiting
23 instruction, so that the jury could be advised that defendant
24 wasn't able to adduce these -- or the government wasn't able
25 to offer these statements prior to this point, for reasons you

1 need not concern yourself with.

2 THE COURT: Okay. Let's talk about the third
3 statement and whether it was a -- let's assume with you that
4 it was a proffer statement. You're saying that you have a
5 contractual prohibition against introducing that statement
6 during your case in chief.

7 It seems that the defendant is waiving its rights
8 under that contract. So, can you still maintain that the
9 third statement is something that is off-limits during your
10 case in chief?

11 Well first of all, am I right, Mr. Mitchell, that
12 even assuming, contrary to what you say, that it was a proffer
13 statement, are you entitled to relinquish your rights under
14 that contract and say the government can use statement No. 3
15 during trial?

16 MR. MITCHELL: Again, Judge, two responses. One, I
17 think the fact that he made -- if the government's position is
18 that this is a proffer, I think that sort of ends it, because
19 it's not inconsistent with the proffer. He can raise it.

20 But the second issue is that we're not going to be
21 objecting to them raising this issue at all, whether they
22 decided to -- the concern I have is this: The government has
23 taken three statements from Mr. Estell, and they're choosing
24 which one they believe is the most accurate. What I'm saying
25 is that clearly, if you look at all three statements, that's

1 not quite accurate, either.

2 So, we are not telling the government that they're
3 off-limits strategically in how they present their case
4 because their hands are tied because of the proffer
5 protections.

6 THE COURT: Well, you're saying their hands are tied
7 with respect to No. 2.

8 MR. MITCHELL: I don't know if it's tied with No. 2,
9 either, because statement No. 3 directly references statement
10 2. And so he -- he references that as part of his third
11 statement.

12 So, I would argue that none of it is protected if,
13 in fact, 3 is allowed to be admitted and used in the case in
14 chief.

15 THE COURT: What's stopping -- I don't know what your
16 positions are. Okay? I have to know what your positions are,
17 and then I have to figure out: Is there even an issue for us
18 to discuss once I know what your issues are?

19 You're saying that you cannot introduce 2 and 3
20 because if you did, it would violate the contract that you
21 have with the defendant, is that correct?

22 MR. KING: That is correct.

23 THE COURT: Okay. He's saying that there is no such
24 contract, or he's saying if there is a contract, he's
25 releasing you from your obligation under the contract.

1 MR. KING: I think that was your question. I didn't
2 think that was the answer.

3 THE COURT: Okay.

4 MR. KING: If he says, "We have no objection and we
5 fully intend to have that as part of our defense," that may
6 resolve the issue.

7 THE COURT: No, it's not about he's using it as part
8 of his defense.

9 MR. KING: No, but --

10 THE COURT: In terms of you using it in your case in
11 chief.

12 Mr. Mitchell, does the defendant object to the
13 government's using statements 2 and 3 as part of its case in
14 chief?

15 MR. MITCHELL: No, Judge.

16 THE COURT: Okay. Where does that leave you with
17 respect to this motion *in limine*?

18 MR. KING: I believe it may make it moot, your Honor.
19 I'd like to -- just because the law on proffer is something
20 which we take very carefully, I'd just like to double-check
21 and make sure that that wouldn't run afoul of any of our
22 policies. But that may well moot it, but I'd like to check
23 and just do a little research with the office to make sure.

24 THE COURT: Okay. So, what do I have to -- is there
25 anything I need to decide on motion *in limine* No. 1?

1 MR. MITCHELL: I don't think so, Judge. And just so
2 the record is clear, proffer -- the first proffer statement in
3 June basically says that if a defendant takes a position
4 inconsistent with that statement, the government can use it.

5 THE COURT: Right.

6 MR. MITCHELL: My understanding is that the
7 government's position is statement 3 is inconsistent with
8 statement 2. That's a defense that he can use statement 2.
9 We have no objection to 3. That's what we're offering, so I
10 think -- we're not objecting, Judge, so I don't think that the
11 proffer issue -- I think it is moot.

12 THE COURT: You're not arguing that the government
13 has to use 2 and 3. You're just saying that you have no
14 objection to the government using 2 and 3.

15 MR. MITCHELL: Yes. And we object to any instruction
16 by the Court if they tactically decide to want to focus on 1
17 to say, "Well, we really couldn't use 2 and 3, and we want the
18 jury to know why we didn't raise it in the first place."

19 MR. KING: I think he's crystallized the issue, and
20 if I might just have -- I can respond at the same time, the
21 August 30th, that he's filing his voir dire questions. I'll
22 advise the Court, I don't believe -- I believe that will
23 resolve it, but I'd like the opportunity to just make sure
24 that there is no other legal issue that I'm not focusing on at
25 the moment.

1 THE COURT: Okay. And you want to file something --
2 if motion *in limine* No. 1 is still alive, you'll file
3 something by August 30th?

4 MR. KING: Yes, your Honor.

5 THE COURT: Okay. Is that okay with you?

6 MR. MITCHELL: That's fine. That's why I wanted to
7 get it, Judge, so that if he wanted to make a reply, he could,
8 and we'd --

9 THE COURT: Okay. All right.

10 No. 2, motion *in limine* No. 2 has to do with the
11 prior convictions. And there's a vehicular hijacking in April
12 of 2010 and possession of a stolen vehicle in April of 2010.
13 Was that the same transaction?

14 MR. KING: No, it is not, your Honor.

15 MR. MITCHELL: And there was a conviction on those
16 charges, is that right?

17 MR. KING: Yes, your Honor.

18 MR. MITCHELL: Yes, your Honor.

19 THE COURT: Circuit Court of Cook County?

20 MR. KING: Yes, your Honor.

21 MR. MITCHELL: I believe that's where they are,
22 Judge. I don't have the documents in front of me.

23 MR. KING: Yes, your Honor.

24 THE COURT: And there was a sentence, and that
25 sentence has been served?

1 MR. MITCHELL: That's correct, Judge.

2 MR. KING: Well --

3 THE COURT: Well, maybe he was still on parole.

4 MR. KING: He was still on parole with respect to the
5 hijacking.

6 THE COURT: I see. Mr. Estell is shaking his head,
7 but it doesn't really matter because --

8 MR. KING: I believe he thinks that it's expired, but
9 when he gets arrested on the federal charges, they revoke or
10 stay what's the term on parole. So, I think -- in any event,
11 he was on parole at the time of the crime.

12 THE COURT: Are there any revocation proceedings in
13 state court?

14 MR. MITCHELL: None pending at this time, Judge.

15 THE COURT: All right. And then the controlled
16 substance offense was from November of '95, and Mr. Estell was
17 released in 2003, and then apparently, there was some parole
18 or supervised release -- or was that a federal crime or state
19 crime?

20 MR. KING: That's a federal crime, your Honor.

21 THE COURT: Okay. And the supervised release was
22 revoked in April of 2009, and he was sentenced to 24 months.
23 Was that concurrent with the time served for the state court
24 convictions?

25 MR. MITCHELL: Yes, it was, Judge.

1 MR. KING: I don't know that.

2 THE COURT: Okay. They're saying yes. I'm not sure
3 it matters.

4 And what court in what district was the controlled
5 substance conviction entered?

6 MR. KING: It was in the District of Missouri. I'm
7 not sure which division.

8 MR. MITCHELL: It was in Missouri, Judge, I think
9 Eastern.

10 THE COURT: St. Louis or Kansas City?

11 THE DEFENDANT: Springfield, Missouri.

12 THE COURT: Oh, that's in the middle of the state.

13 MR. KING: I would assume Western District.

14 THE COURT: Okay. And we have argument -- or I guess
15 the parties dispute as to whether these convictions ought to
16 come in for impeachment purposes under Rule 609(a)(1), is that
17 correct?

18 MR. MITCHELL: That's correct, Judge.

19 MR. KING: That's correct.

20 THE COURT: And I just received, as I mentioned,
21 Mr. Mitchell's response brief, so I'm not going to make a
22 ruling right now, because I want to consider the cases that
23 he has cited; but does either side have anything to say,
24 anything additional to say on the prior conviction issue?

25 MR. MITCHELL: No, Judge. I think it's clear.

1 MR. KING: May I have just a moment?

2 THE COURT: I didn't mean to put you on the spot,
3 Mr. King.

4 MR. KING: No, your Honor. I quickly just jotted
5 down something this morning. We haven't had a chance to fully
6 examine it; but I noticed that the notion of what constitutes
7 coercion, it admits immediately, that the threat's immediate.

8 There's -- I think he's drawing a distinction between
9 his sincerity and his credibility. Credibility is an issue,
10 particularly where he's the one describing how immediate the
11 threat is and that it was a viable threat. There's also --
12 and really, it is the lynchpin here is his credibility,
13 because he must establish by evidence that the threatened harm
14 was present, immediate, or impending.

15 There's also a reference that there's other incidents
16 endangering the defendant. And I don't know that -- it's
17 alluded to here, and maybe we just need to address it
18 elsewhere. But as long as you're looking at his motion
19 *in limine* on page 7, six lines up from the bottom, there's a
20 reference that the defendant may testify to other incidents
21 endangering the defendant. I think that's something we should
22 somewhere today discuss as to --

23 THE COURT: What are you referring to?

24 MR. KING: Page 7, I think I said six lines up from
25 the bottom, provide context for undisputed evidence of real

1 threats and other incidents endangering the defendant. I
2 don't think we want to end up at trial trying to figure out
3 what those might be, the relevance of those, or any particular
4 403 rulings. I think that's probably something we should
5 flesh out ahead of time.

6 THE COURT: What page are you --

7 MR. KING: Page -- my copy says page 7. His --
8 another version says page 6. I'm sorry, your Honor.

9 MR. MITCHELL: Which one?

10 MR. KING: I'm looking at Document 158. You're
11 looking at 163, your Honor?

12 THE COURT: I see. I have docket No. 61, and it
13 looks to be on page 6, four lines from the bottom. "Solicited
14 to provide context for the undisputed evidence of real threats
15 and other incidents endangering the defendant." And what's
16 your argument?

17 MR. KING: I'm just alerting the Court that that's
18 tucked in here. I don't know what those other things are.
19 That may well be something, and I believe that probably is
20 something we should join issue on before trial because I don't
21 know what these other issues are, what the 403 probative value
22 of these would be or admissibility. And I think -- it
23 directly attack -- answer the 609 question, but it suggests
24 that there's yet other issues to be addressed.

25 MR. MITCHELL: If I can reply, Judge, that was the

1 reason why I attached the fifth statement, and page 5 of the
2 fifth statement basically talks about specifically past
3 problems he had in 2007 riding his motorcycle, chased by
4 unknown persons. He was run off the road. He remained in a
5 hospital paralyzed. There's records.

6 And then with respect to Tinka being chased and run
7 off the road and being threatened as well, those were
8 indicated to the government that -- back in December, that
9 there was a pattern of individuals that on repeated occasions
10 had threatened Mr. Estell, and he was trying to identify who
11 those persons were likely and what they were -- regard.

12 So, again, this was not sort of an isolated incident.
13 What Mr. Estell attempted to do, I think -- and again, I
14 wasn't the counsel at the time at the beginning, but I talked
15 to him, is to lay out why these things are continuing even
16 while he's at the MCC.

17 So, the government is aware of this pattern, and
18 they're aware of the arrest. They're aware of the hospital
19 stay. They're -- he's been provided copies of letters and
20 threats that were given to the MCC, phone calls and the like.

21 So, it's not simply one. It's a pattern, Judge.

22 THE COURT: So, you're saying these prior incidents
23 buttress his defense that he had been kidnapped and forced
24 into this bank robbery?

25 MR. MITCHELL: Yes. Because the government's

1 position -- and I don't want to speak for Mr. King -- is that
2 that's just fabricated. That's just -- he's making it up as
3 he goes.

4 And what Mr. Estell did in December was point out
5 that his life has been threatened and he has been in harm's
6 way because of the relationship and things that he's done that
7 he's not proud of for a period of time that has threatened him
8 and his fiancée. And it's been this series.

9 So, it's not that this is sort of just plucked out of
10 the air. This is an ongoing pattern, and it continued all the
11 way through at the MCC, which is what prompted this statement
12 on December 12th in the first instance. It wasn't something
13 that he called over and said, "I want to talk to you about
14 these things." There were additional follow-up incidents that
15 caused this final third statement to come to pass.

16 MR. KING: I think -- I think this points out the
17 issue. If he's talking about seeking to offer evidence of a
18 motorcycle accident eight years before the crime, that's
19 something which is perhaps something that it's going to --
20 we're going to object to under 403.

21 I mean, there may -- maybe we will, maybe we won't,
22 but there's something that needs -- there may be evidentiary
23 issues, I'm pointing out to the Court.

24 THE COURT: I see.

25 MR. KING: He's pointing out an eight-year-old

1 traffic accident. He's suggesting that events which occurred
2 after the crime -- so he's arrested in June. In November, a
3 letter arrives, and he -- which purports to threaten him or
4 reaffirm his participation with another. A statement after
5 the fact he may be seeking to introduce to prove something
6 which occurred six months earlier, and there may be some
7 evidentiary problems with that.

8 THE COURT: Right. I understand what you're saying.
9 I understand what you're saying. You're saying if these
10 things are -- have no conceivable -- the other incidents have
11 no conceivable relationship with the alleged kidnapping in
12 June, then they're not admissible.

13 What Mr. Mitchell is saying is that it's all part of
14 the same -- same threat complex that Mr. Estell has been
15 subjected to.

16 MR. KING: Yes. And I'm suggesting that if he --
17 perhaps if he lays it out, the Court is in a better position
18 to make -- have time to make a ruling in terms of balancing --
19 or maybe the Court can't until the evidence is produced, but
20 I'm just suggesting that there's going to be some interesting
21 legal issues, evidentiary issues as to whether an event eight
22 years before the event is relevant to an immediate threat in
23 2012, or whether a statement, a hearsay statement by an
24 unknown party six months after the event is admissible.

25 THE COURT: Well, a threat isn't hearsay. A threat's

1 a verbal act.

2 But with respect to the 2007 incident, are you saying
3 that these are the same folks who were involved in the
4 kidnapping?

5 MR. MITCHELL: Judge, I think, as I point out in my
6 response, if the government is going to be attacking, which
7 I'm sure they are, Mr. Estell's credibility and that's why the
8 prior convictions from 1995 and everything else is coming up
9 and saying he's this bad person that shouldn't be believed,
10 he's got convictions and the like, the bottom line, if he
11 described the threats and who he suspected might be the
12 individuals who are providing the threats and why he believed
13 it was immediate and sincere and real and he laid out clearly
14 truthful information concerning prior injuries and threats and
15 injuries he suffered for similar-type folks and that this
16 could be tied, I think that is directly relevant to his
17 credibility.

18 It sounds as if the government is picking and
19 choosing those things that are clearly corroborated
20 independent of Mr. Estell's testimony are not admissible, and
21 the things that he's testifying to are admissible, but we are
22 going to challenge his credibility based on some prior
23 convictions.

24 I would just think, Judge, that given the government
25 has had this statement since December, that the jury should be

1 allowed to hear the whole completeness of the statement as
2 given if the government's going to allege that it's not true;
3 and those individual specific things that he identifies are
4 clearly essential to the whole completeness of the statement.

5 THE COURT: What do you mean by the statement? Do
6 you mean the written statement, or do you mean that
7 Mr. Estell's going to testify consistent with the
8 December 12th statement? Because if you're saying the written
9 statement, I'd like to know how it is going to come in.

10 MR. MITCHELL: No, no, not the written statement
11 itself, but the question as to what he said on December 12th
12 to the government in respect to his participation in the bank
13 robbery; and those statements that were made, for
14 completeness, if they're going to challenge the credibility,
15 that statement needs to be there, Judge, all of them.

16 THE COURT: I don't know what you're -- I have no
17 idea what you're saying. I don't even understand the argument
18 you're trying to make.

19 What is it that you want to do that you think that
20 I'm not going to let you do or that you think the government's
21 going to object to you doing?

22 MR. MITCHELL: The government, if I understand
23 Mr. King -- and he can explain it -- will be objecting to
24 particular statements made --

25 THE COURT: Please don't say statement. Because when

1 you say statement, I'm thinking about this written statement.
2 Are you talking about testimony from Mr. Estell --

3 MR. MITCHELL: Yes, Judge.

4 THE COURT: -- or are you talking about something
5 that's going to come in through some document?

6 MR. MITCHELL: It may come in through Mr. Estell or
7 from the agents who are investigating the threats.

8 THE COURT: Okay. Okay. So, you're going to -- you
9 would like to introduce evidence regarding this 2007 incident?

10 MR. MITCHELL: Yes, Judge.

11 THE COURT: Okay. And you would also like to
12 introduce evidence regarding the November -- what you're
13 calling the November 2012 threat?

14 MR. MITCHELL: That is correct, Judge.

15 THE COURT: And the government's going to object to
16 that on relevance grounds, perhaps, is that right?

17 MR. KING: Yes, your Honor. It depends how it comes
18 out and if it's tied up. That's why we're suggesting if he
19 lays it out, we can all be in a better position to --

20 THE COURT: And what Mr. Mitchell is saying is while
21 he's not going to try and introduce this written statement
22 perhaps, the background is laid out -- you -- everything you
23 need to know is in the written statement, and that's what the
24 evidence is going to be, is that right, Mr. Mitchell?

25 MR. MITCHELL: That's correct, Judge.

1 THE COURT: Okay. So, given that understanding,
2 Mr. King, do you have any thoughts?

3 MR. KING: My thoughts are, your Honor, the
4 references to being chased by unknown people in 2007 --

5 THE COURT: Right.

6 MR. KING: -- years beforehand, that will not likely
7 meet the 403 balancing test for relevance without more.

8 THE COURT: Okay.

9 MR. KING: If that's -- but if he's got more in mind,
10 then we can re-evaluate the position.

11 I'm most concerned that there's other events which we
12 have not yet heard about. This accident in 2007 and the
13 crimes in '12, we understand.

14 THE COURT: Okay. Is there anything else -- any
15 other evidence --

16 (Discussion had between the defendant and counsel.)

17 MR. MITCHELL: Judge, I understand what Mr. King
18 wants, and what we'll do, Judge, is we'll lay everything out
19 as we can. I believe it's all in that statement in
20 December 12, but again, I wasn't there, and I want to make
21 sure that I don't shortchange Mr. Estell's story and
22 essentially what he provided the information.

23 So, I will tender a more complete, more detailed --

24 THE COURT: Okay. And maybe I have to -- maybe there
25 has to be a proffer outside the presence of the jury --

1 MR. MITCHELL: I understand, Judge.

2 THE COURT: -- that will allow me to make a 403
3 evaluation of both the 2007 motorcycle incident and the
4 November 2012 threat incident.

5 MR. MITCHELL: Yes, Judge.

6 THE COURT: And one of the things I'll be looking at
7 are: Who are the folks that were involved in each incident?
8 What's their connection to the alleged coercion and the
9 alleged kidnapping? That's one of the things I'll be looking
10 at.

11 MR. MITCHELL: Yes, Judge.

12 THE COURT: So, I don't think we -- I don't think I
13 want to, and I don't even think I can make a decision on this
14 right now. But maybe the way we do it is before -- if
15 Mr. Estell is going to testify, is to have something outside
16 the presence of the jury that will allow me to make the proper
17 evidentiary determination.

18 Is there any other way in which you're going to try
19 and get this evidence, evidence regarding the 2007 incident
20 and the November 2012 threat, into evidence?

21 MR. MITCHELL: It's probably with the other
22 individuals involved, Judge. I mean, there's police officers
23 that did the investigation. There's reports that were
24 prepared. Those are some of the documents that we have.

25 And also, I think Miss Tinka Randall was actually

1 involved and provided one of the reports. She's listed as one
2 of the government's witnesses.

3 THE COURT: Okay. Is there going to be any objection
4 from the government to the defendant introducing evidence
5 regarding the 2007 and the November 2012 matters in the way in
6 which Mr. Mitchell said he's going to introduce them?

7 MR. KING: I can't tell you in a vacuum. I haven't
8 seen it. We don't know where the accident took place, who --
9 what jurisdiction, what happened. We don't have reports that
10 he's described. So, I can't really tell you.

11 I think just offering a report would be hearsay, and
12 we'd object to that. If he has another person describing it,
13 I mean, I'm not trying to preclude him from something, but I
14 want to make sure that there's something I can get my arms
15 around, look at it and evaluate it and make an intelligent
16 decision before I make an objection. I have nothing to
17 substantiate this.

18 If you look at the attachment that he has, "I am run
19 off the road by people I don't know. I don't know if it has
20 any connection. I am speculating this and maybe another
21 incident is tied to this robbery."

22 The details make a difference. I think if he makes
23 some type of evidentiary proffer or shows us, provides us with
24 the reports that he wants to do, if we can reasonably do
25 things, then we can make a decision.

1 THE COURT: Okay. And the only reason I ask you, I
2 just want to know: Is there going to be an evidentiary
3 dispute? If so, when is it going to arise? And given that,
4 what's the best way to deal with it?

5 So, why don't we do it this way: If there comes a
6 point during the trial, Mr. Mitchell, where you're going to
7 try to introduce this evidence regarding what we've been
8 calling the other incidents, let the Court know and let
9 Mr. King know; and then we'll figure out whether I need to
10 take a proffer outside the presence of the jury.

11 MR. MITCHELL: Yes, Judge.

12 THE COURT: And I'll get you a ruling probably before
13 trial on the 609(a) issue.

14 The defendant's not objecting to motion *in limine*
15 No. 3, 4, and 6, so those are granted.

16 No. 5, arguments about missing witnesses, what's your
17 position, Mr. Mitchell?

18 MR. MITCHELL: Judge, as I read the government's
19 motion -- and I had to read it two or three times. I really
20 wasn't sure that I understood where they -- what they wanted
21 to prohibit, which is basically any argument that any relevant
22 inference can be drawn from the fact that additional witnesses
23 did not testify, to include any unidentified individuals.

24 One of the critical questions here, Judge, with
25 respect to credibility -- and I understand Mr. King's

1 position. He took the statement on December 12th. He did an
2 evaluation with respect to whether it was credible or not.
3 And action or inaction was taken based on what he believed was
4 appropriate.

5 The fact that Mr. Estell was in the MCC in custody at
6 the time and provided this information and whether or not
7 there was any investigation to corroborate or to investigate,
8 given the detailed information that he was provided, I think
9 is relevant, Judge. And I don't know if Mr. King wants
10 prohibit me from even arguing to the jury with respect to the
11 credibility of Mr. Estell that he's given all of this
12 information, and somehow because there's no one who followed
13 through, that that's something that can't be inferred or
14 argued to the jury, that it's somehow Mr. Estell's fault that
15 the government did nothing with the information that they
16 received.

17 THE COURT: Mr. King?

18 MR. KING: The missing witness is traditionally a
19 witness which is in the province of one individual or that
20 you'd expect would testify and then he's not called, and you
21 don't want the jury thinking that there's something wrong
22 about that. It's compounded when one side infers that that
23 witness should have been called, and the fact that they
24 didn't, that constitutes doubt.

25 This is -- in this situation, the defendant says,

1 "Individuals whom I don't know did this." It would be
2 hard-pressed to say that individuals whom we don't know, the
3 government should have gotten in.

4 At one point, he falsely implicates a teller. Later,
5 he says, "Well, the teller really isn't involved."

6 At another point, he says, "Well, you know, there's a
7 big gang member who's in prison somewhere. He didn't really
8 like me. Maybe it's him. Maybe it's not."

9 I don't know that the Court should be in a position
10 of trotting in every gang member or every other criminal that
11 he had a fight with that could possibly be but is not. He's
12 setting up straw men, and I think it's an inappropriate
13 argument to be suggesting at some point that -- and the
14 document that he attached to it, he doesn't know. He claims
15 he doesn't know who did this.

16 THE COURT: Okay. Who's the missing witness?

17 MR. MITCHELL: Again, Judge, I'm not -- I think from
18 their motion *in limine* that they're not trying to prohibit me
19 from saying that the government should have called Mr. X or
20 Mr. B, and that's not going to be the argument. The question
21 is that the government's going to argue that this can't be
22 believed because none of this is true; but yet at the same
23 time, they want to prohibit me from saying, "Well, what did
24 you do to investigate it?"

25 THE COURT: Okay. Are you trying to stop him from

1 saying that?

2 MR. KING: No, but I will now. That was not a
3 response to -- I think the argument has mutated --

4 THE COURT: And the reason I ask you is I want to
5 know whether there's an actual disagreement.

6 MR. KING: I think there is now.

7 THE COURT: Okay.

8 MR. KING: It isn't as to -- I believe he's
9 suggesting that there is no -- he will not argue that the
10 government should have called any specific person, because
11 there is no identifiable person. So, the missing witness sort
12 of is covered.

13 But I think what he wants to now argue is, which
14 brings a new issue, is the government's -- there's something
15 wrong with the government's investigation; and, therefore,
16 that brings reasonable doubt. And there's case law on that,
17 and I can respond to that as well.

18 But deficiencies in the government investigation is
19 not a proper -- it's in the nature of jury nullification. "If
20 you don't like the way the government did this, then that's a
21 problem."

22 THE COURT: Okay. It sounds like we -- you disagree
23 with that, but it sounds like we have a different issue than
24 the issue that was articulated in motion *in limine* No. 5.

25 MR. MITCHELL: That's why I said I was confused,

1 Judge, as to what it is. There's evidence that I've been able
2 to see, and I think Mr. King -- and I don't know why this
3 isn't the case at all. But there was one police report that
4 indicates that a person called in because either they got a
5 text or a phone call from an unknown person talking about a
6 bank robbery around the time that the bank robbery was
7 occurring, and the number was not related at all to Mr. Estell
8 or anyone else. And somebody reported it to the police
9 because it seemed very strange that someone either missed out
10 a number in reporting something or whatever else.

11 There's also indications that people observed cars
12 leaving the area of the bank around that period of time of the
13 bank robbery, but there's no follow-up with that
14 investigation, either.

15 I mean, I've got these reports, and the concern I
16 have, Judge, is this: To be completely open, it was clear in
17 statement No. 1, when Mr. Estell was questioned by the
18 Oak Lawn Police Department, 11, 12 hours after he was arrested
19 and he was questioned there, that they suspected that there
20 were accomplices, one or more, no question about that. They
21 didn't believe that he -- taking the wrap for himself was
22 credible.

23 When he came in for statement No. 2, the government
24 again was sure that there had to be accomplices and the like,
25 and there appears to be, there's some indication that there

1 may or may not have been, that they had evidence that there
2 was.

3 So, what we have is that by the time the threats
4 come in from the MCC that are now reported to the MCC as
5 officials because Mr. Estell understands that he can't do
6 anything to protect his family on the outside, he tells the
7 MCC, and the officials contact the Assistant U.S. Attorney,
8 and they take the whole story.

9 The question, Judge, is: Then what happens? And I
10 think that's a fair argument if you want to challenge
11 Mr. Estell's credibility, with how this information came to be
12 known to the government. And it would be unfair with respect
13 to the defendant to -- on the one hand to argue that this is
14 fabricated without allowing the defendant to say, "Listen, I
15 gave them everything that I did. I gave them everything that
16 I know. And I don't know what they did with it." And I think
17 that's a fair argument to make.

18 THE COURT: Okay. It sounds like we have a new
19 motion *in limine*. You said you were going to file a brief on
20 motion *in limine* No. 1 perhaps on August 30th. Let me move
21 that up to August 23rd, and why don't you also brief the issue
22 that's now been raised regarding the adequacy of the
23 government's investigation.

24 And then, Mr. Mitchell, if you'd like to file a
25 response, let me ask that you do so by September 3rd.

1 MR. MITCHELL: Yes, Judge.

2 THE COURT: And let's come back in -- and tell me if
3 this doesn't work for you. Let's come back in on
4 September 6th, which is the Friday before trial, at 9:30, to
5 tie up any loose ends that we're leaving today. Is that all
6 right with both sides?

7 MR. MITCHELL: Yes, Judge.

8 MR. KING: Yes, your Honor. I'm sorry. I just
9 didn't hear the last couple of words.

10 THE COURT: Tie up some loose ends.

11 MR. KING: Thanks, your Honor.

12 THE COURT: And I'll give you a ruling on the 609(a)
13 motion. I'll give you a ruling on this new motion *in limine*.
14 We'll see if we have any more clarity regarding the other
15 incidents and maybe figure out how we're going to address
16 that.

17 Okay. Is there -- that ends the motions *in limine*,
18 at least for now. Is there anything else that the parties
19 would like to address?

20 MR. KING: No, your Honor. As I alluded to before,
21 the government is still working on the destruction order for
22 the phones, but we may come to you this week with a motion to
23 see if we can determine some location of phones. So, we'll
24 shoot a copy to Mr. Mitchell and see. If we can't agree, I'll
25 motion it up.

1 THE COURT: Okay. All right. Anything else?

2 MR. MITCHELL: I don't have anything, Judge.

3 THE COURT: Okay. Everything -- everything of note
4 that took place today, I'll set forth in the order that will
5 issue today or tomorrow, and it will give the briefing
6 schedule and the like, and it will also set the September 6th
7 hearing.

8 MR. KING: Thank you.

9 MR. MITCHELL: Thank you, Judge.

10 THE COURT: Thank you.

11 (Which were all the proceedings heard.)

12 CERTIFICATE

13 I certify that the foregoing is a correct transcript from
14 the record of proceedings in the above-entitled matter.

15

16 */s/Charles R. Zandi*

August 18, 2014

17 _____
18 Charles R. Zandi
19 Official Court Reporter

Date

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